

OWNERSHIP OF IMMOVABLE PROPERTY

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INTRODUCTION

Various entities can hold ownership of immovable property. Transfer can be effected to a purchaser in his personal capacity (a natural person) or to a legal entity (a trust, a company or close corporation*) and the choice depends on the specific circumstances of the purchaser. (* The new Companies Act, that came into operation on 1 May 2011, provides that no new close corporations can be incorporated as from this date. Close corporations that already existed at the time, may continue to exist and may sell and purchase property as before.)

RELEVANT FACTORS

■ TRANSFER DUTY

Transfer Duty is paid by a purchaser on the acquisition of immovable property. It is payable to the Receiver of Revenue on all transactions which are not subject to VAT. The rate is based on a sliding scale and is the same for natural persons, companies, close corporations and trusts that purchase property.

Transfer duty is also payable on the transfer of a member's interest in a close corporation owning



residential property, on the transfer of shares in a property owning company and on the transfer of the beneficial interest in a Trust holding property.

- Note that if a purchaser signs an agreement of sale personally whilst reserving the right to nominate another person or entity as purchaser (usually within a stipulated period) then the nominee must be appointed on the same date of signing the agreement. If the nominee is appointed later, SARS will construe it as a subsequent sale transaction and double transfer duty will be payable. A purchaser must therefore have a clear idea of the entity in which he intends acquiring ownership at the time of contracting, since a nomination (and acceptance thereof by the nominee) offers too little time to make an informed decision.

If a purchaser chooses to buy a property in a company that is not formed yet, the agreement of sale must be signed by the purchaser "on behalf of the company to be formed." Once the company is formed, it must ratify the decision to purchase the immovable property.

Note that the Trust Property Control Act does not provide for the acquisition of immovable property on behalf of a Trust that is not yet in existence and it is therefore not possible to sign a sale agreement for a Trust to be formed.

■ VAT

Purchasers must keep in mind that no transfer duty is payable if the transaction attracts VAT. VAT is payable where a seller is a VAT vendor and selling property that forms part of his VAT enterprise. If VAT is payable, the seller is liable to pay it over to SARS. It is imperative that the Deed of Sale clearly indicates whether the purchase price includes or excludes VAT. If the property is being sold as part of a going concern and both the seller and purchaser are VAT registered, then the transaction will be "zero-rated" for VAT. The Deed of Sale must then stipulate that the property is being sold as part of a going concern.

Whether VAT or transfer duty is payable, it is important to ensure that the parties are up to date with the filing of their returns with SARS, otherwise delays will ensue since SARS will not issue a receipt until the parties are compliant.



■ PROTECTION FROM CREDITORS

If a purchaser intends to trade or run a business on the property, it may be to his advantage to purchase the property in an entity in order to ensure that his business creditors will only be able to lay claim to business assets, whilst the property owned in his private capacity generally remains protected from claims.

■ CAPITAL GAINS TAX AND ESTATE DUTY

The first R2 million of any profit made on the sale of a property by an individual is exempt from CGT, provided the property in question constitutes the individual's primary residence. This applies to South African residents only.

■ ESTATE DUTY

On death of the individual, his/her estate (including the immovable property held in his/her individual capacity) with certain deductions, will be subject to estate duty. A rebate of R3.5 million is granted, but the remaining value is taxed at 20% for the value up to R30 million and 25% on the value exceeding R30 million.

■ CAPITAL GAINS TAX AND ENTITIES

Capital gains tax will be payable as indicated in the table below.

	2017*	2018**
Individuals and special trusts	16.4%	18%
Companies	22.4%	22.4%
Other trusts	32.8%	36%

*Up to 28 February 2017.

**As from 1 March 2017, up to and including the 2018/2019 tax year.



THE FOR AND AGAINST OF OWNING AS A NATURAL PERSON

FOR:

- Lower rate of CGT.
- First R2 million of profit is exempt from CGT if it is a primary residence.
- No auditors or accounting officer's fees.

AGAINST:

- R2 million exemption does not apply to non-residents or to properties not used for residential purposes.
- R2 million exemption does not apply to second or further properties.
- Estate duty payable on death.

THE FOR AND AGAINST OF OWNING IN AN ENTITY

■ Purchasing As a Private Company

FOR:

- At the time of acquisition of the immovable property, the agreement of sale can be signed on behalf of a company "to be formed" and the contract ratified by the company after its formation – thereby effectively allowing nominations at the time of signature without the entity being in existence or named at the time of signature.
- In the past a company was prohibited from providing financial assistance to a purchaser for the purpose of or in connection with the acquisition of shares in that company. Accordingly a bond could not be registered over the company's property to finance the acquisition of shares. With effect from December 2007 such financial assistance is possible albeit in limited instances only. This may assist with the acquisition of property.

**AGAINST:**

- Higher rate of CGT than payable by individuals:
- Only in limited instances may bonds be registered over company property to pay for the acquisition of shares therein.
- Annual financial statements must be submitted.
- Where the property being sold is the only asset (or the largest of all the assets of the company), a special resolution must be passed by the company's shareholders, consenting to the sale.
- In order for the shareholder to access the profit made by the company, the company will have to declare a dividend which will attract dividend withholding tax.
- If you are the shareholder of a company or member of a close corporation, then the net value of the shares or membership interest will form part of your estate when determining any liability for estate duty.

- Shares in the company or the membership in a close corporation are assets in an estate and can be attached by creditors in the event of sequestration.

■ Purchasing as a Trust**FOR**

- An effective estate planning tool.
- The assets held in a trust are not subject to estate duty.
- Eliminates the complications arising when there are multiple heirs in your estate since the trust remains the owner even after your death.
- The trust is a separate legal entity and the trust assets cannot be attached by the creditors of the beneficiaries.



AGAINST

- Highest rate of CGT if profits on the sale of the property are taxed in the hands of the Trust. Note that profits can also be distributed to the beneficiaries and taxed at their applicable marginal rate of income tax resulting in a maximum net capital gains tax cost at a rate applicable to individuals. The same principle can be applied to income generated by the trust. It can either be taxed in the hands of the trust or it can be distributed to the beneficiaries to be included in their gross income.
- Income tax is levied at a flat rate of 45% which is more than you would pay if the property was held in another entity.
- Unlike companies, a trust must be in existence at the date of signature of the agreement to purchase.

CONCLUSION

The decision on the appropriate entity for the acquisition of immovable property is not to be taken lightly. The information included here is not meant to be exhaustive and it is therefore recommended that the purchaser consults an attorney prior to signing an agreement of sale in order to obtain expert advice having regard to the purchaser's specific personal circumstances.

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